Supreme Court, U.S.
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NO. 80-120

In the Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED
JULY 25, 1980
CERTIORARI GRANTED NOVEMBER 3, 1980

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May 12, 1978

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Letter from Petitioner, St. Martin's Evangelical Lutheran Church, to South Dakota Department of Labor — Unemployment Insurance Division requesting hearing to determine liability for coverage under South Dakota Unemployment Compensation Insurance Law.

June 22, 1978

Notice of Hearing on July 19, 1978 by Appeals Referee, South Dakota Department of Labor — Unemployment Insurance Division, to Northwestern Lutheran Academy

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April 2, 1979

Judgment by Hughes County Circuit Court, Sixth Judicial Circuit, for the State of South Dakota filed

April 6, 1979

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May 2, 1980
Petition for Rehearing Denied by Supreme Court of South Dakota

STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF HUGHES SIXTH JUDICIAL CIRCUIT

In the Matter of the Determination of Unemployment Insurance Coverage of Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church School

NOTICE OF APPEAL

TO: THE SOUTH DAKOTA DEPARTMENT OF LABOR, UNEMPLOYMENT INSURANCE DIVISION

PLEASE TAKE NOTICE that the Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church School, hereinafter referred to as Appellants, hereby appeal the Administrative Decision of the South Dakota Department of Labor, Unemployment Insurance Division, dated September 15, 1978, to the Circuit Court of the Sixth Judicial Circuit, State of South Dakota, County of Hughes.

YOU ARE FURTHER HEREBY NOTIFIED that the Administrative Decision appealed from held that St. Martin's Evangelical Lutheran Church School and the Northwestern Lutheran Academy are employers subject to coverage by the South Dakota Unemployment Insurance Law and that female teachers at those schools are not exempt from coverage.

YOU ARE FURTHER HEREBY NOTIFIED that the substantial rights of the Appellants have been prejudiced because the Administrative Decision is in violation of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United

States, and in violation of Article VI, Section 3 of the Constitution of the State of South Dakota, is affected by other error of law, is clearly erroneous in light of the entire evidence in the record, and is arbitrary, capricious, and characterized by abuse of discretion.

Dated this 3rd day of October, 1978.

SIEGEL, BARNETT, SCHUTZ,
O'KEEFE, JEWETT & KING
500 Capitol Building, Box 1269
Aberdeen, South Dakota 57401

Rory King
Attorneys for Appellants

(Certificate of Service Omitted in Printing)

STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF HUGHES SIXTH JUDICIAL CIRCUIT

In the Matter of the Determination of Unemployment Insurance Coverage of Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church School

ASSIGNMENT OF ERRORS

The above named Appellants, by their attorneys, Von Briesen & Redmond, S.C., and Siegel, Barnett, Schutz, O'Keefe, Jewett & King, hereby assign the following errors in the Administrative Decision of the Appeals Referee dated September 15, 1978, and a part of the files and records herein, and state that the Court should reverse said Decision because said Decision prejudices the substantial rights of Appellants, and because the inferences, conclusions and decisions contained therein are contrary to the applicable law and are unsupported by substantial evidence, to-wit:

1. The Referee erred in concluding on Page 5 of the Opinion that St. Martin's Evangelical Lutheran Church School and Northwestern Lutheran Academy are employers subject to the South Dakota Unemployment Insurance laws.
2. The Referee erred in concluding on Page 5 of the Opinion that the term "church" has been interpreted to the states to be used, within the context of unemployment insurance coverage, in a limited sense and to be synonomous with an individual "house of worship" maintained by a particular congregation.
3. The Referee erred in concluding on Page 5 of

the Opinion that the employees in question are not employed by a church within the meaning of such term and in concluding that the employees in question are employed by a school.

4. The Referee erred in concluding on Page 6 of the Opinion that the primary purpose of the schools is educational and not religious.

5. The Referee erred in concluding on Page 6 of the Opinion that the female teachers are not members of a religious order in the exercise of duties required by such order.

6. The Referee erred in rejecting, on Page 6 of the Opinion, Appellant's argument that the extension of coverage to certain employees of Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church involves excessive entanglement by the state contrary to the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States, and contrary to Article VI, Section 3, of the Constitution of the State of South Dakota.

7. The Referee erred in concluding in the Decision that the services rendered at Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church are not excluded from the South Dakota Unemployment Insurance laws under Sec. 61-1-10.4(1)(a), (b) or 61-1-10.4(2).

WHEREFORE, Appellants pray that the Administrative Decision of the Appeals Referee be reversed.

Dated this 17th day of November, 1978.

VON BRIESEN &
REDMOND, S.D.
757 North Broadway
Milwaukee, Wisconsin 53202

-and-

SIEGEL, BARNETT, SCHUTZ,
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By Rory King
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Northwestern Lutheran
Academy and St. Martin's
Evangelical Lutheran Church
School

(Certificate of Service Omitted in Printing)

STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF HUGHES SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF THE DETERMINATION OF UNEMPLOYMENT INSURANCE COVERAGE OF NORTHWESTERN LUTHERAN ACADEMY AND ST. MARTIN'S EVANGELICAL LUTHERAN SCHOOL.

CIV. NO. 78-248

NOTICE OF APPEAL

TO: NORTHWESTERN LUTHERAN ACADEMY AND ST. MARTIN'S EVANGELICAL LUTHERAN CHURCH SCHOOL AND THEIR ATTORNEY RORY KING.

Notice is hereby given that the State of South Dakota does hereby appeal to the Supreme Court of the State of South Dakota from the whole of the decision and judgment made and entered in the above-entitled action, said judgment being filed in the office of the clerk of the Circuit Court, Sixth Judicial Circuit, in and for the County of Hughes, State of South Dakota, on the 2nd day of April, 1979, and from the whole of the record in said action.

Dated this 25 day of May, 1979.

MARK V. MEIERHENRY
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(Certificate of Service Omitted in Printing)

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE DETERMINATION OF UNEMPLOYMENT INSURANCE COVERAGE OF NORTHWESTERN LUTHERAN ACADEMY AND ST. MARTIN'S EVANGELICAL LUTHERAN SCHOOL.	ASSIGNMENTS OF ERROR
	Civil No. 78-248

The Appellant, State of South Dakota, by and through its Assistant Attorney General, Judith A. Atkinson, hereby makes the following Assignments of Error upon which it will rely on its appeal to the Supreme Court of South Dakota.

I.

The court erred in holding that employment by church-related nonprofit elementary and secondary schools is exempt from unemployment taxation by the State Department of Labor by reason of SDCL 61-1-10 and the general construction of that section.

II.

The court erred in failing to reach the constitutional issues presented in the case, and in failing to hold there is no conflict between religious freedom and the Employment Act.

Dated this 16 day of June, 1979.

MARK V. MEIERHENRY
ATTORNEY GENERAL

Judith A. Atkinson
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501

(Certificate of Service Omitted in Printing)

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE DETERMINATION OF UNEMPLOYMENT INSURANCE COVERAGE OF NORTHWESTERN LUTHERAN ACADEMY AND ST. MARTIN'S EVANGELICAL LUTHERAN CHURCH	File No. 12801 PETITION FOR REHEARING

The petitioners, Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church, by their attorneys, von Briesen & Redmond, S.C., and Siegel, Barnett, Schutz, O'Keefe, Jewett & King, as their petition for a rehearing respectfully state that:

1. In holding that the court must show great deference to the interpretation given the statute by the U.S. Department of Labor, the court was not aware of the decision of the Administrative Law Judge in the Conformity Proceedings for Alabama and Nevada (attached as Exhibit A), which decision was made public after oral argument in this case. The court was also not aware of the Memoranda from the U.S. Department of Labor signed by Lawrence E. Weatherford, Jr., Administrator, Unemployment Insurance Service dated December 7, 1976, and February 2, 1977 (Exhibits B and C attached) to all State Agency Administrators and all Regional Administrators, Employment and Training Administrators, which Memoranda were contemporaneous interpretations by the U.S. Department of Labor and wherein the Department of Labor concluded that "the changes made in Section 3309 by P.L. 94-566 do not change the application of the exclusions in Section 3309(b)(1)(A) and (B)." The memoranda are discussed in the Administrative Law Judge's decision in the conformity proceedings of Alabama and Nevada.

2. The court misapprehended the principle of statutory construction that when the words of a statute are clear, the plain language of the statute is controlling and resort to administrative interpretation or legislative history is not appropriate.

3. In holding that the court must give great deference to the interpretation given the statute by the U.S. Department of Labor, the court overlooked the prior congressional history of the term "church" under the tax laws of the U.S. and administered by the Internal Revenue Service and the U.S. Treasury Department.

4. In holding that the 1970 amendments to FUTA evidenced an intent by Congress to cover church related schools, the court overlooked the inherent differences recognized by the U.S. Supreme Court between the college level and the elementary and secondary level of education at church affiliated schools (*Tilton v. Richardson,* 403 U.S. 672 [1971]).

5. In holding that the estimated 242,000 new employees who would be covered as a result of the repeal of the exemption for elementary and secondary schools was significant, the court misapprehended the fact that the Census Bureau's statistical abstract of the U.S. cited by the Department of Labor states that there are 261,000 full-time teachers alone in non-profit elementary and secondary schools in 1975, a figure which does not include the support personnel of the school such as administrators, secretaries, maintenance, food service, etc., all of whom must be covered under the Department of Labor's interpretation and would swell the number of employees of non-profit elementary and secondary schools far beyond 242,000 if services in church related schools were covered.

6. In recognizing the entanglement between the church and state but distinguishing the U.S. Supreme Court decision in *NLRB v. Catholic Bishops of Chicago,* 99 S. Ct. 1313, 59 L. Ed.2d 533 (1979) on the grounds that "the minimal entanglement that might result in the present case, however, does not approach the potential effect, noted in *Catholic Bishop*. . .", the court misapprehended the U.S. Supreme Court test set forth in *Catholic Bishop:*

> The Board argues that it can avoid excessive entanglement since it will resolve only factual issues . . . but at this stage of our consideration we are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue. Rather, we make a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that First Amendment will be infringed. [59 L. Ed.2d at p. 542]
>
> Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the court to resolve difficult and sensitive questions arising out of guarantees of the First Amendment religion clauses. [59 L. Ed.2d at p. 545]

In applying the test under *Catholic Bishop,* the court overlooked prior congressional history of the term "church", the contemporaneous interpretation by the U.S. Department of Labor in 1976 and 1977 and the memo by the U.S. Department of Labor solicitor, Carin Ann Clauss (Administrative Record — State Exhibit #2) in which she recommended:

> Obviously, if subsection (1) applied to church-related elementary and secondary schools prior to the 1976 amendments it continues to apply since the leg-

islative history is silent . . . Option 3 would apply (1) in all circumstances based upon the silent legislative history of the 1976 amendments and avoidance of possible constitutional involvement.

7. In holding that the Unemployment Compensation Tax Law is not invalid as applied to the petitioners, the court misapprehended the constitutional issue of the excessive entanglement of church and state which invalidates the statute as applied to the petitioners.

Based upon the above-described grounds, petitioners respectfully request a rehearing in this matter.

Dated this 8 day of April, 1980.

Respectfully submitted,

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EXHIBIT A

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

October 11, 1979

MEMORANDUM FOR: THE SECRETARY

FROM: NAHUM LITT
Chief Administrative Law Judge

SUBJECT: United States Department of Labor v. State of Alabama Department of Industrial Relations and State of Nevada Employment Security Department

Pursuant to the Notice of Hearing and Rules of Procedure pertaining to the above-captioned conformity proceeding, I am enclosing for your consideration the original and one copy of the Recommended Decision herein.

Copies are simultaneously being served on counsel of record for the parties, the interested parties and those states against whom proceedings were commenced but continued.

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

UNITED STATES DEPARTMENT
OF LABOR

vs.

STATE OF ALABAMA
DEPARTMENT OF INDUSTRIAL
RELATIONS and STATE OF
NEVADA EMPLOYMENT
SECURITY DEPARTMENT[1]

Conformity
Proceeding

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Before: WILLIAM A. GERSHUNY
Administrative Law Judge

RECOMMENDED DECISION

This case arises out of the Secretary's interpretation of the 1976 amendment to Section 3309(b) of the Federal Unemployment Tax Act, 26 U.S.C. 3309(b) (hereafter "FUTA"), as requiring extension of unemployment compensation coverage by the states to employees of primary and secondary religious schools. Two states, Alabama and Nevada, construe the statutory provision as exempting such schools from coverage and have been determined by the Secretary to be in noncompliance with FUTA. At stake is their entitlement, under 42 U.S.C. 502-504, to millions of dollars annually through Department of Labor grants to pay for the costs of administering their unemployment laws. At issue is whether Congress intended, under Sec. 3309(b) of FUTA, to provide unemployment compensation benefits to employees of such schools and to fund the program on the basis of an excise tax imposed on the religious schools.[2]

For the reasons expressed herein, I conclude that Congress did not so intend and, accordingly, I recommend that the States be certified by the Secretary as entitled to federal grants to pay for the costs of administering their unemployment laws.

I

Procedurally, this case was initiated by the Secretary's filing of a notice of Hearing on August 10, 1979. The commencement of this proceeding was preceded by the Secretary's formal notification to the States of their noncompliance by letter dated July 6, 1979 and their requests for a hearing on July 16 (Alabama) and 17 (Nevada). The Secretary's Notice scheduled the hearing for September 5, 1979 in Washington, D.C. and established rules of procedure which, *inter alia,* required the issuance of a recommended decision by not later than October 17, 1979 and otherwise forbade the administrative law judge from granting continuances which would prevent the issuance of the decision by that date. By Order dated August 10, 1979, a prehearing conference was scheduled for August 27, 1979 to consider stipulation of the record. In addition, pretrial discovery was preliminarily banned. Over the course of several weeks, under the direct supervision of the administrative law judge, the parties were able to stipulate virtually all the facts relating to the state laws and their impact on church schools and to the organization of Catholic, Baptist and Lutheran church schools and their academic programs. An evidentiary hearing was held on September 26, 1979, briefs submitted thereafter and oral argument heard on October 9, 1979. On September 25, one day prior to the hearing, the Secretary offered to consent to a continuance of the hearing and to certify the states as in compliance in 1979, if the states would agree to such a continuance *prior* to the commencement of the administrative hearing. On the morning of the hearing, four states so agreed and the proceedings involving them were severed and continued generally. Alabama and Nevada's counterproposal to proceed with the hearing so as not to unduly inconvenience the

large number of out-of-town counsel and then stay further proceedings was rejected by the Secretary.

Against this procedural backdrop, the states contend that they have been denied procedural due process in that their opportunity for an administrative hearing was grossly restricted by the Secretary's delay in commencing the proceeding and his requirement that a decision be rendered by the administrative law judge by October 17. Whatever the merits of this contention might be, it is clear that, under the Secretary's *ad hoc* rules of procedure, I lack authority to consider and decide the issue. Rule 4 requires issuance of the recommended decision by October 17 and, the record will reflect, there was no remaining time for discovery or other trial preparation. In any event, there is nothing in this record to reflect that either of the states was deprived of an opportunity to offer evidence which it considered vital to its case.

II

The Federal Unemployment Tax Act (FUTA) had its roots in the fertile fields of New Deal legislation of the 1930's. In its original version, 49 Stat. 620, FUTA imposed an excise tax on "for profit" employers with eight or more employees and, as an incentive for the enactment of State unemployment compensation laws, allowed covered employers a credit against federal tax liability for up to 90% of contributions to a federally approved state program and provided for grants to states with qualifying programs to pay for costs of administration. As a consequence, all states enacted mirror images of FUTA.

Coverage was broadened in 1970 with enactment of the Employment Security Amendments Act, 84 Stat. 695,

which imposed the tax on employers of one or more employees and redefined employer to include non-profit organizations. Included in the 1970 amendments was a new section 3309 to the Internal Revenue Code of 1954, which nevertheless continued the prior exemption of services performed

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education;

In 1974, to combat a severe economic downturn, Congress enacted a Special Unemployment Assistance Program (SUA), 83 Stat. 1845, which temporarily provided benefits, at the sole expense of the federal government, to employees of non-profit elementary and secondary schools, who were not covered under the regular program. Because such non-profit schools were not subjected to any tax liability under the SUA program, there was no occasion to consider constitutional implications of the legislation.

However, the SUA program soon was replaced by the Unemployment Compensation Amendments of 1976, 90 Stat. 2667, which, in relevant part, deleted subsection (3) of Section 3309(b). Construing this amendment as evi-

dence of a Congressional intent to provide permanent coverage to all employees of church elementary and secondary schools (except ministers and those performing strictly church duties in the schools) the Department initiated this proceeding to determine whether Alabama and Nevada, which otherwise construed the amendment, are maintaining a "conforming" unemployment compensation program and, thus, are eligible for massive federal grants.

III

Essentially all the facts relevant to the issues presented have been stipulated by the parties. Because no recommended findings need be made, the facts will be summarized only.

Alabama's initial efforts to provide coverage for employees of church related elementary and secondary schools were enjoined permanently on January 29, 1979, in *Trinity Evangelical Lutheran Church v. Department of Industrial Relations,* No. CV 78 500325, Cir. Court Mobile County, and preliminarily enjoined on January 22, 1979 in another suit filed by Baptist and Methodist churches. The State volunarily dismissed its appeal of the former and thereafter ceased its efforts to compel church schools in Alabama to pay unemployment taxes.

Nevada came into "non-compliance" with its factual determination that Roman Catholic elementary and secondary schools, under the State equivalent of subsection (b)(1), were exempt because services in those schools were performed in the employ of the church or a church-controlled organization operated primarily for religious purposes. For purposes of this proceeding, the Department does not challenge the State's factual conclusions.

Roman Catholic elementary and secondary schools are operated and controlled by the Bishop of the Diocese, have no separate corporate existence, were founded for religious reasons and teach otherwise secular subjects with religious content. Principals are priests, subject to direct control of the appropriate parish priest. Student participation in religious exercises is an integral part of the curriculum. Operating funds are derived principally from church members. Only 3-5% of the lay teachers are non-Catholic. Teachers are employed by the principal and parish priest, are paid by the Diocese, teach subjects with religious content and perform religious duties, and are subject to discharge for not fulfilling the Church's religious mission.

Baptist churches are tax-exempt corporations whose members are fundamental Bible believers. Its day schools are considered as integral and functional parts of the church, occupy the same facilities as the church, are controlled and supported by the maintaining church. Superintendents are ordained ministers or graduates of religiously oriented colleges. Religious instruction is mandatory, "secular" subjects are taught in conformity with church doctrine, textbooks are published by religious institutions and operating funds are derived from the church budget. Teachers are either ordained ministers or other certified individuals, are hired by the superintendent and paster, are subject to discharge for breach of religious doctrine and must be members of the church.

Lutheran elementary and secondary schools are controlled and operated by the church, which is a tax-exempt corporation. It selects the curriculum and hires and supervises the school staff. The curriculum is similar to that of secular schools. Operating funds are derived by the

church and student tuition. Teachers are paid from church funds and school facilities, often located in the church building, are owned by the church. Teachers are subject to discharge for failure to teach church doctrine by word and personal example, both inside and outside the classroom. Religious instruction is required and all subjects are taught in conformity with church doctrine.

If such schools are covered under FUTA, they would be required to maintain employment records, to file periodic reports with the states and respond to individual claims for benefits; would be subject to periodic examination as to the amount of their contributions and administrative inquiries as to the nature and extent of covered services; and would be subject to civil and criminal enforcement procedures. The states would be required to determine whether a claimant was dischargd for misconduct or voluntarily left his employment without good cause.

IV

The Department's position in this proceeding is somewhat elusive. On the one hand, it asserts that Congressional deletion of the school exemption in subsection (3) "militates strongly in favor of construing the statute to cover *all* elementary and secondary schools, including those organized by the churches. . ." (Brief p. 11) and that the religious purposes exemption of subsection (1) "is not available as an exemption because coverage of elementary and secondary school activity was intended by Congress . . . [and] to conclude otherwise would be to carve out a special rule based upon religious motivation offending the Establishment Clause of the First Amendment to the Constitution" (Brief p. 22). On the other hand, it asserts that subsection (2) exempts ordained min-

isters and members of religious orders in the exercise of their religious duties in such schools and that the performance of church duties (as distinguished from school duties) by church employees at the schools pursuant to their church responsibilities likewise is exempt under 3309(b)(1). (Brief p. 2)

More specifically, it contends that the words "in the employ of a church" in subsection (b)(1) is intended to refer not to the employing entity, i.e. the religious organization, but rather to the function being performed by the employee, e.g. teaching. The word "church", it argues, refers to the house of worship and not the organization. Thus, for example, a lay employee of a religious organization teaching religious doctrine at an elementary school conducted by that organization in its house of worship would be covered under FUTA and the exemptive provisions of subsection (b)(1) would be inapplicable.

Its position as to the interpretation of 3309, it argues, raises no constitutional issues because coverage of church schools under FUTA does not create execessive governmental entanglements with the church. In this connection, it contends that neither the program's record-keeping and filing requirements nor its administrative inquiries as to elegibility for benefits would require the government "to become involved in such issues as resolving disputes as to church doctrine in order to resolve claims for benefits" (Brief p. 17).

Not only is the Department's position as to the meaning of section 3309(b) elusive, it has not remained constant. Shortly after enactment of the 1976 amendments, which in part deleted subsection (3) of section 3309(b), the Department formally advised the states that the effect of

this change is to mandate coverage of elementary and secondary schools operated by the State and its political subdivisions or by nonprofit organizations" (ALJ Exh. 2, pp. 24-25). Coverage of church schools was not suggested. Thereafter, in a December, 1976 Department memorandum to the states, the following question and answer appeared:

> *Question:*
>
> Do the 1976 amendments affect church related schools?
>
> *Answer:*
>
> Yes, to the extent that coverage is extended to elementary and secondary schools. In other respects no changes were made, and the exclusion in sections 3309(b)(1), (2) . . . are still applicable. . . . For example, the coverage of nonprofit elementary and secondary schools does not affect the optional exclusion in 3309(b)(1).

(ALJ Exh. 3, p. 5). Having thus affirmed the applicability of the exemptive provisions of section 3309(b)(1) to church schools, the Department went on, in a February, 1977, memorandum to the states, to explain the criteria for determining applicability of the provision:

> Thus, under section 3309(b)(1), FUTA, it must first be determined whether the workers in question are employed by a church or by an organization other than the church. If the workers are employed by a church, their services are excluded. Whether the church is the employer is primarily a question of fact. If, however, the workers are not employed by the church, it must then be determined whether the employing organization is operated primarily for religious purposes. If operated primarily for religi-

> ous purposes, the services are excluded only if the employing organization is operated, supervised, controlled or principally supported by the church.
>
> The determination of whether the exclusion applies can be made only after a thorough analysis of the legal interests and relationships between the organization and the church.
>
> The changes made in section 3309 by P.L. 94-566 do not change the application of the exclusions in section 3309(b)(1)(A) and (B).

(ALJ Exh. 4, pp. 6-7). Significant is the Department's interpretation of the words "in the employ of a church" as meaning the "employing organization" and not, as presently contended, the physical structure where religious functions are performed.

By April, 1978, the Department tacitly rejected its earlier contemporaneous construction of the 1976 amendments and formally adopted the position asserted in these proceedings (DOL Exh. 1). By memoranda dated May 30, 1978 (DOL Exh. 2) and November 13, 1978 (ALJ Exh. 7), the Department advised the states that church related elementary and secondary schools were covered and the exemptive provisions of subsection (b)(1)(A) and (B) have no application to church activities performed in church related elementary and secondary schools "since schools are not churches within the meaning of that section" (DOL Exh. 2, p. 2).

The position of Alabama and Nevada, supported by a number of religious organizations, is that church schools, being an integral part of the governing church and fundamentally religious in character, are exempt from coverage under the plain language of section 3309(b)(1)

(A) and/or (B). Moreover, they contend that, while the legislative history does not specifically address the status of church schools under section 3309(b)(1), it "plainly indicates" a Congressional intent to exempt all services where the church is the employing entity. And, finally, the States argue that the Department's construction of section 3309(b) is impermissible for the reason that it would render the legislation violative of the First and Fourteenth Amendments to the Constitution under the excessive entanglement doctrine established by the Supreme Court.

V

There is no lack of precedent as to the application of Section 3309(b)(1) to church elementary and secondary schools. In each of the three lower court decisions rendered to date, the Department's position has been flatly rejected as contrary to the plain meaning of the statute, unsupported by the legislative history and constitutionally impermissible. *Trinity Evangelical Lutheran Church v. Department of Industrial Relations,* Case No. CV 78 550325, Cir.Ct.Mobile County, Ala. (January 27, 1979); *Roman Catholic Church v. State of Louisiana,* No. 219,660, 19th Jud.Dist.Ct., East Baton Rouge Parish, La. (August 31, 1979); *Grace Bretheren Church v. State of California,* Case No. CV 79-93, USDC, CDCal (September 21, 1979).

The precise contentions of the Department in this case were advanced by the State of Alabama in *Trinity Evangelical* and by the Department itself in *Grace Bretheren.* There, the courts reviewed the legislative history of FUTA, including the 1976 amendments which deleted the school exemption provisions of (b)(3); examined the teachings of the Supreme Court in *NRLB v. Catholic*

Bishop, 99 S.Ct. 1313 (1979) and *Lemon v. Kurtzman,* 403 U.S. 602 (1971); and considered the potential entanglement by the states in religious activities of the church. Their thoughtful and highly persuasive decisions are adopted here in their entirety, with the following additional comments.

First, a construction of the language "in the employ of a church" which looks to religious function and place of worship, rather than identification of the employing organization, plainly ignores the language employed by Congress not only in the statute itself, but also in its legislative history (H.R.Rept 612, 91st Cong., 1st Sess. 44; "where the employer is the church. . . ."). Moreover, earlier contemporaneous interpretations of the Department's Unemployment Insurance Service, which presumably worked closely with the Congress in the original enactment and subsequent amendment of Section 3309, advised the states that the determination to be made under (b)(1) was the identity of the "employing organization" (ALJ Exh. 4).

Second, the Department's reliance on a reference in the legislative history to the figure of 242,000 employees in all non-profit elementary and secondary schools as evidence of Congressional intent to cover employees of church schools is wholly misplaced. Department testimony in this case reflects that the figure is without meaning unless accompanied by the raw data and, admittedly, the record is silent as to Congressional understanding of the figure or the supporting data. In any event, a legislative cloak embracing integral church functions can hardly be woven with such a slender thread.

Third, the notion that complete Congressional silence in the legislative history evidences its intent to cover church schools by deleting the school exemption in sub-

section (b) (3) is unwarranted in the absence of definitive statutory language. Indeed, where, as here, the Congress manifested concern as to the constitutionality of its coverage of state employees in light of a recent Supreme Court decision (S.Rep. 94-1265, 94th Cong., 2d Sess. 8-9), yet failed even to address the more obvious constitutional question as to coverage of church schools, the only permissible inference to be drawn from that silence is that Congress was actually aware of the limitations of legislative authority and had not the slightest intention of entangling government in church function.

And fourth, the Department's construction of Section 3309(b) is inconsistent with government interpretations of the term "church", as used elsewhere throughout the Internal Revenue Code, to include church schools. See e.g., 26 C.F.R. 1.1508-1. Common sense, if nothing else, dictates that like terms in a statute be given like interpretations in the absence of a clearly expressed Congressional intention to the contrary. Admittedly, no such expression is to be found in the voluminous legislative history of FUTA.

RECOMMENDATION

For the foregoing reasons, it is recommended that the Secretary make a determination that the States of Alabama and Nevada are in compliance with the Federal Unemployment Tax Act and certify each to be entitled to federal grants to pay for the costs of administering their unemployment laws.

/s/ William A. Gershuny
WILLIAM A. GERSHUNY
Administrative Law Judge

Dated: October 11, 1979
Washington, D.C.

FOOTNOTES

1. Proceedings against four additional states, Tennessee, Washington, Texas and Michigan, were postponed by agreement of the parties. The following were granted interested party status with rights to submit briefs and participate in oral argument:

Alabama Association of Christian Schools
Tedd N. Williams, Esquire
Gibbs & Craze
6929 W. 130th Street
Cleveland, OH 44130

Roman Catholic Diocese of Nashville and Memphis
Dick Taylor, Esquire
300 James Robertson Parkway
Nashville, Tenn. 37201

United States Catholic Conference
George Reed, Esquire
Gerald C. Tobin, Esquire
1312 Massachusetts Ave. N.W.
Washington, D.C. 20005

General Conference of Seventh-day Adventists
Lee Boothby, Esquire
Suite 629
6930 Carroll Avenue
Washington, D.C. 20012

Martha Miles
Thomas G. Keith, Esquire
Legal Services
601 Terry-Hutchens Building
Huntsville, Ala. 35801

Lutheran Church-Missouri Synod
Philip E. Draheim, Esquire
17th Floor
515 Olive Street
St. Louis, Mo. 63101

2. At least one state, California, will continue to receive grant monies for the reason that it is "out of compliance" due to a preliminary injunction issued on September 21, 1979 by the United States District Court for the Central District of California in *Grace Brethren Church et al., v. State of California et al.,* No. CV 79-93.

EXHIBIT B

U.S. DEPARTMENT OF LABOR
Employment and Training Administration
Washington, D.C. 20213

MEMORANDUM FOR: ALL STATE AGENCY ADMINISTRATORS AND ALL REGIONAL ADMINISTRATORS, EMPLOYMENT AND TRAINING ADMINISTRATION

FROM: LAWRENCE E. WEATHERFORD, JR.
Administrator, Unemployment Insurance Service

SUBJECT: Supplement #1 — Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566*

Following enactment of H.R. 10210 (P.L. 94-566) and the issuance of *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566,* legislative planning meetings were

held in Washington, D.C., Atlanta, Georgia, Kansas City, Kansas and San Francisco, California. The enclosed questions and answers reflect inquiries made during these meetings.

The questions and answers are keyed to the applicable provision and its commentary in the *1976 Draft Legislation* and are issued as a supplement to it.

Please annotate your copies of the *1976 Draft Legislation* to reflect these additions.

Additional explanations and interpretations will be issued as needed and appropriate.

Enclosure

Supplement 1, 1976 Draft Legislation
December 7, 1976

* * *

Service excluded from required coverage of nonprofit organizations, section 2(k)(1)(D)
Refer: Commentary, page 25

1. *Question:*
Do the 1976 amendments affect church related schools?

Answer:
Yes, to the extent that coverage is extended to elementary and secondary schools. In other respects no changes were made, and the exclusion in sections 3309(b),(1), (2), (4), and (5) are still applicable. Accordingly the commentary on pages 27-30, *1970 Draft Legislation,* together with subsequent interpretations and explanations are still applicable.

For example, the coverage of nonprofit elementary and secondary schools does not affect the optional exclusion

in 3309(b)(1). The factors significant in determining whether or not service is performed

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches"

remain unchanged.

Some of these matters were dealt with in various issues of Interpretation Series, P.L. 91-373 which are still pertinent.

* * *

EXHIBIT C

U.S. DEPARTMENT OF LABOR
Employment and Training Administration
Washington, D.C. 20213

MEMORANDUM FOR: ALL STATE AGENCY ADMINISTRATORS AND ALL REGIONAL ADMINISTRATORS, EMPLOYMENT AND TRAINING ADMINISTRATION

FROM: LAWRENCE E. WEATHERFORD, JR.
Administrator, Unemployment Insurance Service

SUBJECT: Supplement #2 — Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566*

By this time a number of draft proposals to implement the provisions of P.L. 94-566 have been sent to the National office for review. The enclosed questions and an-

swers reflect issues that have arisen in the course of that review.

The questions and answers are keyed to the applicable provisions and its commentary in the *1976 Draft Legislation* and are issued as the second supplement to it.

Please annotate your copies of the *1976 Draft Legislation* to reflect these additions.

Additional explanations and interpretations will be issued as needed and appropriate.

Enclosure

Supplement 2, 1976 Draft Legislation
February 2, 1977

* * *

Definitions — service for nonprofit organizations, section 2(k)(1)(C)
Refer: Commentary, page 25

1. *Question:*
Must an "organization" be a "legal entity" for the purposes of section 3309(b)(1), FUTA?

Answer:
No. Section 3309(b)(1) provides that service performed —

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches"

may be excluded from the required coverage of governmental entities and nonprofit organizations.

The word "organization" is broader than the phrase "legal entity" and will include but not be limited to such

entities. Accordingly, an organization within the meaning of section 3309(b)(1) need not be a separate legal entity, but includes any organization other than the unit constituting a church or convention or association of churches, even though the organization may be so closely connected to the church, etc., as in fact to be operated, supervised or controlled by the church itself.

See also the Answer to Question 2 below.

2. *Question:*
What factors govern the application of the exclusions in section 3309(b)(1)(A) and (B), FUTA?

Answer:
Only services performed directly in the employ of a church or convention or association of churches, as distinguished from any other organization, are excluded under subparagraph (A). The exclusion in (B) involves a two part test: (1) Is the employer some other organization than the church or a convention or association of churches? (2) Are the services performed for an organization which is (operated, supervised, controlled, or principally supported by a church, or convention or association of churches) operated primarily for religious purposes?

The fact that the organization is owned, operated, supervised and controlled by a church does not justify a conclusion that the services performed for the organization are performed in the employ of the church rather than the organization. Ownership does not necessarily signify exclusive possession and control. Ownership may be retained concurrently with the creation and exercise of other legal interests. Furthermore, the form under which the organization is operated, supervised or controlled may be distinct from that entity which operates, super-

vises and controls the religious activities of the church, even though the church retains ownership of the organization and even if the same individuals comprise the authority of both the organization and the church.

With respect to the second test, if the services are performed for an organization other than the church, the services may be excluded *only* if the organization (which is operated, supervised, controlled or principally supported by a church or convention or association of churches) is operated primarily for religious purposes.

Thus, under section 3309(b)(1), FUTA, it must first be determined whether the workers in question are employed by a church or by an organization other than the church. If the workers are employed by a church, their services are excluded. Whether the church is the employer is primarily a question of fact. If, however, the workers are not employed by the church, it must then be determined whether the employing organization is operated primarily for religious purposes. If operated primarily for religious purposes, the services are excluded only if the employing organization is operated, supervised, controlled or principally supported by the church.

The determination of whether the exclusion applies can be made only after a thorough analysis of the legal interests and relationships between the organization and the church.

The changes made in section 3309 by P.L. 94-566 do not change the application of the exclusions in section 3309 (b)(1)(A) and (B).

U.S. DEPARTMENT OF LABOR
Employment and Training Administration
Washington, D.C. 20213

DIRECTIVE: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 39-78

TO: ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM: LAWRENCE W. ROGERS
Administrator
Field Operations

SUBJECT: Unemployment Insurance Coverage of Employees of Church-Related Nonprofit Elementary and Secondary Schools

1. *Purpose.* To inform SESAs of the following Secretary of Labor's decision concerning unemployment insurance coverage of employees of church-related nonprofit elementary and secondary schools: By repealing the former exclusion in section 3309(b)(3) of the Federal Unemployment Tax Act (FUTA) relating to services for education institutions, Congress clearly intended to extend coverage to services for church-related schools.

2. *References.* Sections 3304(a)(6) and 3309(a) and (b), FUTA, as enacted by Public Law 91-373 and amended by Public Law 94-566.

3. *Background.* In 1970, Congress extended unemployment insurance coverage to services for nonprofit organizations (and State hospitals and institutions of higher education) by requiring that State UI laws cover these services effective January 1, 1972, as a condition for Federal certification of the State law for tax credit (Public

Law 91-373). States were, however, permitted to exclude certain services from coverage, including the following services described in section 3309(b), FUTA, performed:

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> "(3) in the employ of a school which is not an institution of higher education."

The 1976 amendments (Public Law 94-566) required, as a condition for tax credit, that States extend coverage, effective January 1, 1978, to most State and local government workers. Although retaining the limited exclusions under paragraphs (1) and (2) above, the Congress deleted the exclusion under paragraph (3) relating to elementary and secondary schools. The question posed was whether their exclusion is permitted pursuant to paragraph (1); paragraph (2) is not at issue.

Several different church groups challenged coverage of a variety of church-related elementary and secondary schools resulting from the repeal of the exemption contained in paragraph (3) basing their position on the alleged applicability of paragraph (1).

4. *Secretary's Decision.* Secretary Marshall's decision concerning unemployment insurance coverage of services performed for church-related schools was announced April 18, 1978, in a letter of that date to the Most Reverend Thomas C. Kelley, O.P., General Secretary, United

States Catholic Conference. Secretary Marshall advised that repeal by Congress of the exclusion in section 3309 (b) (3), FUTA, formerly exempting employees of a school which is not an institution of higher education, was clearly intended to result in State coverage of church-related elementary and secondary schools.

The only services performed in church-related elementary and secondary schools recognized as being within the scope of the exclusion permitted by section 3309(b) (1), FUTA, (and aside from the permitted (b) (2) exclusions) are those strictly church duties performed by church employees at the schools pursuant to their church responsibilities. The exclusion in section 3309(b) (1) (A) relating to church employees has no other application to activities performed in elementary and secondary schools since the schools are not churches within the meaning of that section. The exclusion contained in section 3309(b) (1) (B) applies only to services performed for organizations, other than educational institutions, that are church operated, supervised, controlled, or principally supported and whose employees are primarily engaged in religious activities. Subsection (b) (1) (B) does not apply to institutions where the employees of the institution are primarily engaged in educational activities at the elementary and secondary school level.

These conclusions, which are neutral as between schools operated by religious or secular organizations, give effect to the congressional purpose of extending unemployment insurance protection to virtually all employees. Thus, practically all of the estimated 242,000 employees of nonpublic elementary and secondary schools are covered; approximately 85 percent of the 242,000 are employees of church-related schools. Further, these conclusions are consistent with the well-established legal doctrine that exemptions from remedial statutes are to be narrowly con-

strued and their application limited to those establishments plainly and unmistakably within their terms and spirit.

If an employee performs both non-exempt and exempt services during a single employment period, as in the case of services performed for a church-related school and an organization exempted by section 3309(b)(1), and "if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employees for such period shall be deemed to be employment, but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment," as provided in section 3306(d), FUTA.

5. *Action Required.* All SESAs, except Kentucky for which coverage is deferred by Federal law until January 1, 1979, should inform all nonprofit elementary and secondary schools that services performed in their employ on and after January 1, 1978, are covered, with the limited exceptions specified above. All such employing units which are nonprofit institutions required to be covered should also be advised of their right to elect either the reimbursement or the contribution method of financing benefit costs. The election should be effective January 1, 1978.

If a State has enacted a transition provision authorized by seection 121 of P.L. 94-566, previously exempt services for such schools are usable to establish a claim for benefits similar to other previously exempt services. Benefits based upon wages paid for previously exempt

services may be noncharged as provided in ETA Handbook No. 364, issued September 2, 1977.

States that have held in abeyance or denied claims of employees of nonprofit schools should proceed to process or redetermine those claims. If claims have been established and monetarily determined without the use of wages earned in the employ of nonprofit schools, those claims should be redetermined. All SESA's should report within 30 days of the date of this letter to their respective Regional Offices of the actions they have taken or intend to take with respect to coverage of services in nonprofit schools below the level of institutions of higher education, and treatment of individuals whose claims were filed after December 31, 1977, and whose base period services consisted, in whole or in part, of services in such schools.

Those States which must take legislative or other action in order to implement the coverage requirements prescribed above should report to the Regional Office what actions they intend to take as well as inform them of the effective date of such actions.

6. *Inquiries.* Questions concerning this program letter should be directed to the appropriate Regional Office.

DECISION

MAR 29 1978

MEMORANDUM FOR THE SECRETARY

FROM: CARIN ANN CLAUSS
Solicitor of Labor

SUBJECT: Coverage Under the Federal-State Unemployment Program of Employees of Church-Related Non-Profit Elementary and Secondary Schools

Inquiry has been made of the Employment and Training Administration concerning coverage under the Federal-State Unemployment Compensation Program of employees of church-related non-profit elementary and secondary schools. The question posed is whether States, as a condition to continued participation in the Program, are required to cover employees of such schools under their unemployment compensation laws.

We conclude that as of January 1, 1978, States participating in the Program were required to extend coverage under their unemployment compensation law to employees of nonprofit schools and that employees of church-related non-profit elementary and secondary schools generally may not be excluded from coverage. Employees of nonprofit schools of higher education have been covered since 1970. Only church employees who bear some special relationship to the church and have some church-related responsibility within the school remain outside the scope of required coverage.

The relevant portions of the statutes being construed are Title III of the Social Security Act, as amended (41 U.S.C. 501 *et seq*) and the Federal Unemployment Tax Act (26 U.S.C. 3301 *et seq*). These provisions were amended by Public Law 94-566 (October 20, 1976)

which was an Act "to require States to extend unemployment compensation coverage to certain previously uncovered workers. . . ."

The inclusion of non-public elementary and secondary school employees was accomplished at the same time public elementary and secondary schools were covered by the further restriction of an exemption which prior to amendment read:

> This section shall not apply to service performed —
>
> (3) in the employ of a school which is not an institution of higher education.

P.L. 94-566 repealed subsection (3).

There remains in section 3309(b) subsections (1) and (2) which exempt service performed:

> (1) in the employ of
>
> (A) a church or convention or association of churches; and
>
> (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of the church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order.

Prior to the 1976 amendments consideration of subsections (1) and (2) was not essential since elementary and secondary schools were specifically exempted under subsection (3) regardless of whether they were private, nonprofit or primarily religious schools in order to put them on an even footing with the noncoverage of public schools. With the loss of that exemption, Bishop Kelly and others

have now sought to bring parochial elementary and secondary schools within subsection (1). The alternative positions we have identified for responding to the question follow.

1. Section 3309(b)(1) is limited to church establishments and organizations which primarily engage in the religious activities associated with the exempt establishment.

When implementing the 1970 amendments ETA had considered that subsection (1)(B) did not apply to parochial schools since the only educational "organizations" publicly recognized as "primarily for religious purposes" were seminaries preparing students for the ministry or to become members of religious orders. In the case of subsection (1)(A) "church" was construed in the limited sense synonymous with "house of worship" as a distinct physical place thus narrowing the exclusion to those groups primarily concerned with religious and denominational matters of church government or groups representing church government. This view is consistent with the well-established legal principle normally applicable to exemptions from remedial statutes generally: ". . . these exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 391 (wage-hour); see *Better Business Bureau of Washington, D.C., Inc. v. U.S.*, 326 U.S. 279 (unemployment insurance).

ETA originally published the foregoing view, faithfully reported by the loose-leaf services, by proposing model legislation for the states to adopt in implementing the 1970 amendments covering institutions of higher learn-

ing. This position is favored by ETA, has "neutrality" to recommend it and clearly isolates all elementary and secondary schools as a single class under former subsection (3). It is consistent with the legislative history of bills introduced in the Sixties which, although not enacted, document the purpose of the 1970 amendments. Under this position the repeal of (3) results in covering virtually all of the 242,000 employees of nonpublic elementary and secondary schools Congress "intended" to cover (see S.Rep. No. 94-1265, 94th Cong. 2d sess. 8 [1976]) since Department of Labor statistics show that about 85% of the 242,000 are from church-related schools.

Vulnerability. The position does not attempt to directly deal with the phrase "in the employ of" prefacing the exclusions contained in (b)(1). However, there is abundant judicial authority under the Fair Labor Standards Act for dealing with the very similar problem of exemptions from the wage-hour law that could persuade a court to be controlled by remedial purposes of the legislation in the direction of universal coverage. The Supreme Court long ago acknowledged the common remedial purposes shared by the FLSA and unemployment insurance program (see footnote 1), and the prospects of applying a narrow construction rule should be considered to be favorable.

2. Section 3309(b)(1) should be construed to give effect to the phrase "in the employ of" a "church" or "organization" which is "primarily religious."

A somewhat lesser percentage of the 242,000 would be covered by an alternative position resulting from a complex series of ETA memorandums responding to an inquiry from Colorado. This later view is an attempt to

deal with section 3309(b)(1) on a literal basis and de-emphasizes the distinctly physical characterization of "church" as a "house of worship" or establishment. Instead it focuses upon the employment relationship.[1] Under this literal view all employees of the "church", as a legal entity, would be exempt under (1), and all employees of a separately incorporated elementary or secondary school would be covered by the repeal of (3) even though absolutely controlled by the exempt church and operated for religious purposes.

Vulnerability. While this position appears comfortable at first blush, it does offer the opportunity for numerous interpretative problems relating to employment, legal organization and interrelationship of "churches" and "schools" (e.g., episcopal, congregational, representative governmental structures) by placing a premium on legal employment and ignoring the educational activity as the basis for the former exemption. Thus a religious body organized along episcopal lines obtains a highly centralized authority over the affairs of local bodies and their activities, tending to merge the "church" and the "school" under a single umbrella. At least in those circumstances a nice question is presented as to whether any exemption should be determined merely by the form of business association a particular organization elects rather than on the basis of the activity performed, i.e., the operation of an elementary or secondary school.

---

[1] The courts have followed a common path in defining the employment relationship for coverage purposes under the Fair Labor Standards Act and the Social Security Act which FUTA incorporates. See *U.S. v. Silk,* 331 U.S. 704, 712 followed in *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 724 (1947). Broadly construing "coverage" must be distinguished from narrowly construing "exemptions."

3. Section 3309(b)(1) exempts every church-related elementary or secondary school.

This position would give an expansion reading to "in the employ of . . . (A) a church . . . or (B) an organization which is operated primarily for religious purposes. . . ." This view would project some recent language employed by the Supreme Court in striking down state funds for certain auxiliary services to non-public sectarian elementary and secondary schools:

> The church-related elementary and secondary schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon v. Kurtzman,* 403 U.S. at 616-617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." *Id,* at 657 (opinion of Brennan, J.). See generally Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1688-1689.
>
> For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity, cf. *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. at 781-783 and n. 35, and thus constitutes an impermissible establishment of religion. *Meek v. Pittenger,* 421 U.S. 349, 366 (1975).

Justice Stevens, concurring and dissenting in *Wolman v. Walter,* 37 S.Ct. 2593, 2614 (1977), quoted the language set out above while observing that a sectarian school's mission "at heart is religious" and "the sectarian school itself, not the legislation . . . is 'entangled' with religion." Thus, ". . . excessive entanglement of church and state would result from attempts to police use of material and equipment that were readily divertible to religious uses. . . ." *Meek, supra.* at footnote 16.

Vulnerability. While the Supreme Court has been very cautious in permitting any form of state aid to sectarian education a distinction between aid and remedial legislation to secure socio-economic benefits to employees can be drawn as the Solicitor General has done in the *Catholic Bishop of Chicago* brief, infra. The Supreme Court in that case will hopefully provide guidance as to how far the government can legitimately extend the socio-economic goals into a church-related school. Conversely it may indicate how narrow is the area of church activity that is protected by the First Amendment. These considerations should eventually help us in how best to construe section 3309(b)(1). It suggests that an interpretation of coverage of church-related schools could legitimately await an explicit Congressional mandate thereby avoiding any constitutional litigation with church-related schools until absolutely necessary. Whether a "public interest" group would sue the Department to force a coverage interpretation based upon an alleged "establishment of religion" violation resulting from an interpretation exemption sectarian schools generally is speculative, but not beyond the realm of possibility.

Perhaps the greatest significance is the fact that ETA has been informally indicating a coverage position to the state agencies since the enactment of the 1976 amendments fol-

lowing along the lines of option 1. A change to a "no coverage" position now would be a distinct change of direction that most likely will alienate state agencies most of whom have been supportive of coverage.

Recommendation

Obviously, if subsection (1) applied to church-related elementary and secondary schools prior to the 1976 amendments it continues to apply since the legislative history is silent. Option 1 would indicate that (1) did not apply. Option 2 would allow (1) to apply in some circumstances governed largely by chance organization of the church and its related school. Option 3 would apply (1) in all circumstances based upon the silent legislative history of the 1976 amendments and avoidance of possible constitutional involvement. The Employment and Training Legal Services Division favors option 1.

I, too, favor option 1, although I would be comfortable defending any of the three alternatives.

An abbreviated memorandum of law on the First Amendment is attached for your information and incorporates the arguments made by the Solicitor General in the *Catholic Bishop of Chicago v. NLRB* case now pending in the Supreme Court.

The letter prepared by ETA in response to the inquiry of Bishop Kelly is enclosed.

Enclosure

Memorandum of Law

SUBJECT: COVERAGE UNDER THE FEDERAL-STATE UNEMPLOYMENT COMPENSATION PROGRAM OF EMPLOYERS OF CHURCH-RELATED NON-PROFIT ELEMENTARY AND SECONDARY SCHOOLS

The relevant portions of the statutes being construed are Title III of the Social Security Act, as amended (42 U.S.C. 501 *et seq*) and the Federal Unemployment Tax Act (26 U.S.C. 3301 *et seq*).

I. *Question Presented.*

The question presented is whether Congress, in repealing the exclusion in Section 3309(b)(3) of FUTA, for employees of non-profit elementary and secondary schools, extended coverage to employees of church-related non-profit elementary and secondary schools, or whether the 3309(b)(1) exclusion for persons "in the employ" of a church or "an organization controlled or principally supported" by a church continued their exempt status. Any answer to this question necessarily raises First Amendment considerations. Given this context, an analysis of the statutes, their legislative history, and contemporaneous interpretation of the agency charged with administering these laws suggests that the (b)(1) exclusion for church-related institutions does not apply to employees of nonprofit elementary or secondary schools.

II. *Coverage of Employees of Church-Related Elementary and Secondary Schools is Constitutionally Permissible.*

A.

In November 1977, the Solicitor General summarized the First Amendment as interpreted by the Supreme

Court in a petition for review of the Seventh Circuit's decision in the *Catholic Bishop of Chicago* case:

> The First Amendment provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" embraces two concepts, "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut,* 314 U.S. 296, 303-304. It is therefore settled that the "freedom to act, even when the action is in accord with one's religious convictions", may be reasonably restricted by neutral legislation. *Braunfeld v. Brown,* 366 U.S. 599, 603. See *United States v. Reynolds,* 98 U.S. 145, 166. However, only those governmental "interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder,* 406 U.S. 205, 215. Accordingly, where it is claimed that regulation "interferes with the practice of a legitimate religious belief, it must appear either that the [government] does not deny the free exercise of religious belief by its requirement, or that there is a [governmental] interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id* at 214. See also *Sherbert v. Verner,* 374 U.S. 398, 403.

Following the lines of the Solicitor General's argument leads to these conclusions:

1. The purpose of the Unemployment Compensation Program as amended is entirely secular since it is intended to protect the unemployed by the extension of benefits providing a measure of relief from the loss of income with which to purchase food, clothing and shelter. The substantial governmental interest in the general welfare of her citizens is not seriously open to dispute.

The contention that parochial school operations must be exempt from the requirements of general legislation merely because the institutions have a religious purpose has been rejected. Such schools are not immune from regulations such as fire inspections, zoning ordinances, health and safety standards, minimum wage laws, compulsory attendance requirements, or a number of other governmental restrictions that may have an unintended [neutral], incidental effect upon the schools' religious operations.

2. There has been no suggestion that coverage under the Unemployment Compensation Program would require church-related schools to take action inconsistent with their religious beliefs. Even so, the UI coverage is permissible by the compelling state interest.

B.

There are more than 10,000 parochial schools in the U.S. A number of these have acquiesced in coverage under the 1970 and 1976 amendments with no claim of abridgement of religious freedom. Nevertheless they remain free to raise the sort of issuee litigated by employers generally, and no reasons have been advanced as to why the normal processes of claim resolution cannot work smoothly. If a church official were to contend that an employee was in fact fired for espousing heretical views, the claims examiner would be limited to a determination whether the employer's alleged reason for the discharge was the actual one. Once it is determined that the employee had not been removed or disciplined in an effort to interfere with rights created by the UI program, the inquiry would be at an end. If the employee had been discharged because of the employer's belief that the employee was unquali-

fied to teach in a parochial school, the validity of that belief as a part of church doctrine would play no part in the decision. Concern by church officials that their decisions would be compromised by potential oversight in the claims process is speculative at best and, even if legitimate, would not support a blanket exemption from the Act which could be viewed as governmental action respecting the establishment of religion violative of the First Amendment.